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No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON REARGUMENT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The specially-constituted District Court filed two memorandum opinions. (R. 99, 105.) The first is reported in 30 F. (2d) 940.

The reports of the Interstate Commerce Commission appear as Docket No. 19130, *California Growers' & Shippers' Protective League* v. *Southern Pacific Company et al.*, 129 I. C. C. 25 (R. 16–65), and 132 I. C. C. 582 (R. 65–69).

QUESTIONS PRESENTED

In a proceeding begun upon complaint of California producers and shippers of deciduous fruits, the Interstate Commerce Commission, after full hearing and upon a voluminous record, issued its order requiring the numerous common carriers engaged in the transportation of those commodities to destinations in the east to make reductions in the rates thereon.

The questions, which relate to the validity of the above order, are:

(1) Whether the Commission so misconstrued the Interstate Commerce Act and the Hoch-Smith Resolution, that its order was beyond the power conferred upon it thereby.

(2) Whether the Hoch-Smith Resolution is unconstitutional, either as (*a*) violating the due process clause of the Fifth Amendment, or (*b*) as beyond the power of Congress under the commerce clause.

(3) Whether the reduction of rates as set forth in the order was not supported by any substantial evidence or was confiscatory.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, c. 104, 24 Stat. 379, 380, as amended by the Transportation Act, 1920, c. 91, 41 Stat. 456, 475, 479, 484, 488, 491 (U. S. C. Title 49, Secs. 1, 3, 15, 15a):

SEC. 1. * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing

under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such viola-

tion to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15a. * * *

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

* * * * *

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

The so-called Hoch-Smith Resolution (43 Stat. 801, Public Res. No. 46, S. J. Res. 107; U. S. C. Title 49, Sec. 55), approved January 30, 1925, is as follows:

CHAP. 120.—Joint Resolution Directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with rela-

tion to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

STATEMENT

The growing and shipping of deciduous fruits is one of the great basic industries of California. These fruits are grown throughout the State, from the Imperial Valley north to Redding. The soil and climate are peculiarly adapted to fruit and vegetable culture, and there are large areas that can be used for those purposes only. The growing of deciduous fruits is the most important single agricultural interest in the State, as shown by the values

of its several farm products in 1925: Deciduous fruits $105,756,000, citrus fruits $85,243,000, vegetables $52,047,000, and main field crops $194,675,000. (Ex. 16, R. 216.)

Not more than 5 per cent of the production of fresh fruits in California is consumed there, and most of the product must of necessity move to the large consuming territory in the East.

The principal deciduous fruits shipped from California are grapes, peaches, pears, plums, apricots, cherries, and apples. Practically all of the cherries are shipped by express and most of the peaches and apricots are utilized by the canneries and dried-packing plants within the State.

The principal originating trunk lines are the Southern Pacific, the Santa Fe, and the Western Pacific. The Los Angeles & Salt Lake, a part of the Union Pacific system, handles a relatively small amount of the traffic. The traffic moves over these lines and their connections chiefly to the large cities in the territory east of the Mississippi River, and north of the Ohio.

The fruit is shipped in refrigerator cars. An extra charge in addition to the line-haul rate is made for refrigeration, averaging about $100 a car. (Ex. 26, R. 229.) No complaint was made against the assessment of an additional charge for refrigeration, nor against its amount.

The complaint of the California Fruit Growers' & Shippers' Protective League, before the Commission, brought in issue the deciduous fruit rates

from California to the territory east of the Rocky Mountains. That territory has been divided by the carriers for the purpose of making transcontinental rates into 12 groups, designated by letters, viz, groups A, B, C, D, E, F, G, H, J, K, L, and M. The territorial limits of these groups are shown in the sketch appended to this brief. The most westerly group is "J," embracing the eastern portions of Colorado and New Mexico. With the exception of Group J, the rates applicable to the California deciduous fruit traffic are "blanketed" over all these groups, with the result that the same rate applies from California to any point east of Group J. To Group J the rate is slightly lower than the blanket rate. This enormous blanket, undoubtedly the largest in the United States, was established voluntarily by the carriers, and they desire that it be continued, as do the shippers. All parties to the proceeding agreed that the blanket should not be broken up. The Commission did not disturb it.

When prices are low, transportation charges become an important item of expense in the production and marketing of fruit. That is the present condition of the industry. Since 1922, the industry has suffered because of a marked decline in prices received for the fruit without corresponding reductions in the cost of production, including transportation to markets in the East, and this recession in prices, and consequent economic depression, has continued practically unabated since that date.

Proceedings before the Commission

A. Proceedings in earlier case

Before discussing the proceeding in which the Commission issued the order here assailed, it should be stated that three years previously the same rates were before Division 1 of the Commission upon a complaint filed August 31, 1923, by the same complainant invoking sections 1 and 3 of the Interstate Commerce Act, but upon a less extensive and exhaustive record. *California Growers' & Shippers' Protective League* v. *Southern Pacific Co. et al.*, 100 I. C. C. 79 (Docket 15137), decided June 25, 1925. While that case was pending decision, the Hoch-Smith Resolution was enacted January 30, 1925, carrying a provision that cases then pending before the Commission involving rates on agricultural products should be decided in accordance with the Resolution. Division 1 said, at page 106 of its report:

> We have given consideration to the matters mentioned in the resolution—

but, nevertheless, found that the rates were not unreasonable or unduly prejudicial, and dismissed the complaint, with the statement, however, at page 108:

> This finding is without prejudice to any conclusion which may be reached upon the later and more comprehensive record concerning the relation of railroad rates to agriculture which is expected to be developed in Docket No. 17000.

Docket No. 17000 was the general investigation of the rate structure which the Commission had instituted on its own initiative.

On March 2, 1926, the full Commission denied reargument. (R. 6, 18.)

B. Proceedings in present case

The proceeding which resulted in the issuance of the order assailed by appellants, was instituted by complaint (R. 139) filed by the same complainant December 27, 1926 (R. 6), alleging that the rates of $1.62,[1] carload minimum weight 26,000 pounds, to Group J, and $1.73, with the same minimum, to the other groups, on fresh deciduous fruits, other than apples, were unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, unduly and unreasonably prejudicial, in violation of Section 3 of that Act and higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and upon an unjust and unreasonable basis with relation to other rates, in violation of the Hoch-Smith Resolution. (R. 146.)

It was further alleged that a just, reasonable, nonprejudicial and lawful rate for the transportation of deciduous fruits, in carloads, from points in the State of California to points in all the aforesaid groups should not exceed $1.44, this being the rate that had been in effect immediately following the general increase of 25% effected June 25, 1918.

[1] All rates are herein stated in amounts per 100 pounds.

The rate on apples was lower than on other deciduous fruits, being $1.41 to Group J, and $1.50 to the other groups. The complaint did not attack the reasonableness of these rates on apples. The term "deciduous fruits" will be used hereinafter to mean deciduous fruits other than apples.

It was also alleged that for many years prior to June 25, 1918, the rate maintained for the transportation of deciduous fruits from California to the above-mentioned groups was $1.15 per 100 pounds; that this rate was increased on June 25, 1918, to $1.44 per 100 pounds; that the latter rate remained in effect until August 26, 1920, when it was increased to $1.80 to Group J, and to $1.92 to the other groups; that the last-named rates remained in effect until January 1, 1922, when they were reduced to $1.62 and $1.73, respectively, and that the latter rates had been maintained continuously since the last-mentioned date, without reduction, notwithstanding that the volume of the deciduous fruit traffic had enormously increased, and notwithstanding that subsequently to January 1, 1922, the defendants had substantially reduced the rates maintained and enforced by them for the transportation of a large number of commodities other than deciduous fruits, with the result that the California fruit growers and shippers were required to pay for the transportation of their traffic rates which were disproportionately high and which furnished an undue and unjust propor-

tion of the revenues of the defendant carriers. (R. 142–145.)

The Railroad Commissions of the States of California, Arkansas, and South Dakota, the California Fruit Exchange, the California Farm Bureau Federation, the Arkansas Packing Corporation, and the Ozark Fruit Growers Association intervened in the proceeding before the Commission in support of the complaint. The Department of Agriculture and Markets of the State of New York, and the Departments of Agriculture of Pennsylvania and Michigan intervened in opposition to the complaint. (R. 163.)

After full hearing, briefs were filed and the case was orally argued to the entire Commission. July 20, 1927, the Commission (not a division thereof) issued its report and order, *California Growers' & Shippers' Protective League* v. *Southern Pacific Co. et al.*, 129 I. C. C. 25.

The evidence adduced at the hearing, as will be demonstrated hereinafter, was exhaustive in detail and included within its scope almost every conceivable type of information pertinent to a determination of the issues. The mass of facts contained in the record is stated in condensed form in the Commission's report (R. 16–65), and upon these facts the order (R. 6–7) is based.

The Commission's finding was as follows (R. 59):

> We are of the opinion and find upon a consideration of the whole record that the

rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M inclusive, except Group J, is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; and that the rate of $1.62 currently applicable to Group J points is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.50 and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture. In publishing these rates defendants may increase the carload minimum on grapes to 30,000 pounds.

September 10, 1927, the defendant carriers petitioned the Commission for reconsideration upon the record as made. (R. 7.) November 14, 1927, the Commission issued its report on further consideration, 132 I. C. C. 582 (R. 65), adhering to its former findings and affirming its order of July 20, 1927, except as modified by its order of October 14, 1927, which relieved the carriers of the necessity of establishing the prescribed rates over routes via north Pacific Coast gateways. The prescribed rates became effective February 10, 1928, and are now in force.

Proceedings in court below

November 23, 1927, the appellants filed their petition to enjoin the Commission's order. (R. 1.) A specially-constituted District Court (Circuit Judge Rudkin of the Ninth Circuit, and District Judges St. Sure and Kerrigan) heard appellants' motion for a temporary stay and interlocutory injunction. January 18, 1928, the District Court rendered its memorandum opinion, denying the motion. (R. 99.) After final hearing, the court, on May 3, 1928, rendered its memorandum opinion. (R. 105.) May 9, 1928, final decree was entered, dismissing the bill for want of equity. (R. 107.)

Prior proceedings in this Court

May 11, 1928, appellants filed a "Motion for Stay or Suspension of Operation of Order of Interstate Commerce Commission pending Appeal." May 21, 1928, this Court heard oral argument upon the motion and on May 28, 1928, denied it. On February 25, 1929, this appeal was argued. On May 13, 1929, the cause was restored to the docket for reargument.

SUMMARY OF ARGUMENT

I. The Commission's order was based on no mistake of law and was within the powers conferred upon it by the Interstate Commerce Act and the Hoch-Smith Resolution.

The Commission correctly construed the Resolution as prescribing a test to be observed by it in the determination of the reasonableness of rates on

agricultural products affected by depression. The Resolution sets no new standard of lawfulness, in that it did not contemplate that any rate should be fixed under it which would not have been a lawful rate under the prior law. The rate fixed under the Resolution must be within the so-called zone of reasonableness. But the value of the commodity and the value of the service have always been recognized as factors in the determination of a reasonable rate. The Commission correctly construed the Resolution as requiring it to weigh all the factors normally entering into the determination of the reasonableness of any rate and to fix rates on agricultural products suffering from depression as near the lower limit of the zone of reasonableness as would be compatible with the maintenance of an adequate transportation service. That Congress intended by the Resolution to prescribe a test for the fixing of such rates is shown by the language of the Resolution as well as its historical background and legislative history.

The Commission properly construed the third paragraph of the Resolution as applicable to particular cases. No sufficient reason appears for ascribing to Congress an intent that, except for proceedings pending at the time of its passage, it should only be applied through the comprehensive and necessarily protracted investigation of the entire rate structure.

The Commission has construed the Resolution in harmony with, and not as impliedly repealing, Section 15a of the Interstate Commerce Act. This is shown both by its report in this case and by its holdings in prior decisions under the Resolution.

The Commission did not construe the Resolution as authorizing it to reduce a rate solely because of the depression of the industry, and it gave no undue weight to the economic condition of the complainant's business. Its construction of the Resolution in this and other cases has been that economic considerations furnish one, but not the controlling, factor in the determination of the reasonableness of a rate. It gave proper consideration to the requirement of the Resolution that the rates ordered should promote freedom of movement of agricultural products.

The Commission did not construe the Resolution as directing it to fix rates only "slightly in excess of operating expenses." In this, as well as in other cases, the Commission has construed the Resolution as requiring a rate high enough to cover all the costs that should fairly be allocated to the service under the decisions of this Court, plus at least some margin of profit.

II. The Hoch-Smith Resolution is a valid exercise of the power of Congress to regulate interstate commerce.

The requirement of the Resolution that the rates must be "lawful" necessarily implies that they shall

not be confiscatory. But it is well established that there is a wide field of legislative discretion which permits variety in classification of rates, and there is no constitutional requirement that all rates shall be so fixed as to afford the same percentage of profit. The special treatment of agriculture in the Resolution is not without any reasonable basis or purely arbitrary. The Resolution does not violate the Fifth Amendment.

The Resolution is not an attempted regulation of industry, and does not grant "bounties," "special privileges," or "subsidies." This Court has upheld congressional legislation intended to insure the preservation of a comprehensive system of railroads by relieving the financial necessities of weaker roads which were essential thereto. It is equally within the power of Congress to insure, through reasonable rate regulation, the free movement of essential commodities.

III. The reductions in rates ordered by the Commission are supported by substantial evidence and are not shown to be confiscatory.

The voluminous evidence bearing on the reasonableness of the rate would have amply sustained reduction ordered even apart from the Hoch-Smith Resolution.

The increase in the carload minimum rate on grapes, which constituted 75 to 80 per cent of the entire deciduous fruit traffic, has an important bearing on the reasonableness of the rate and the

carriers' revenues thereunder. The minimum weight is, in fact, an essential part of any carload rate.

The Commission gave consideration to the requirements of the Resolution that the rates should be compatible with the maintenance of adequate transportation service. The evidence showed increasing operating returns in the case of most of the principal carriers engaged in handling this traffic.

There was no substantial evidence that the rates prescribed would be confiscatory. The Commission was justified in regarding the cost study submitted by appellants in this connection as of slight probative value.

ARGUMENT

I

THE COMMISSION'S ORDER WAS BASED ON NO MISTAKE OF LAW AND WAS WITHIN THE POWERS CONFERRED ON IT BY THE INTERSTATE COMMERCE ACT AND THE HOCH-SMITH RESOLUTION

THE COMMISSION CORRECTLY CONSTRUED THE RESOLUTION AS PRESCRIBING A TEST TO BE OBSERVED BY IT IN THE DETERMINATION OF THE REASONABLENESS OF RATES ON AGRICULTURAL PRODUCTS AFFECTED BY DEPRESSION

The Hoch-Smith Resolution is a joint resolution passed by the Senate and the House, and approved by the President January 30, 1925. It is a consolidation of two resolutions, H. J. Res. 141, introduced by Congressman Homer Hoch, of Kansas (member of the Committee on Interstate and Foreign Com-

merce), and S. J. Res. 107, introduced by Senator Ellison D. Smith, of South Carolina (then Chairman of the Committee on Interstate Commerce).

Having been passed by both houses of Congress and signed by the President, the Resolution has the force of statute law. *Levey* v. *Stockslager,* 129 U. S. 470; *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, 184; *United States* v. *Chavez,* 228 U. S. 525.

The Resolution is in three paragraphs, the first of which declares it to be the true policy in rate-making to be pursued by the Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

The second paragraph directs the Commission to make a nation-wide investigation of all rates and to correct defects. This the Commission is doing. *Rate Structure Investigation,* Docket No. 17000. (Its order instituting this investigation is in the record, pp. 514–522.)

The third paragraph, which is more particularly involved here, provides that,

> In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depres-

sion, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

The Commission's interpretation of this third paragraph, as explained in its report (R. 26–28), is in substance as follows:

The Resolution sets no new standard of lawfulness of rates, but provides, in effect, that to the extent that there are flexible limits to the Commission's discretion, the Commission shall require the maintenance of the lowest rates on products of agriculture falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service; in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less value. The substance of the provision of the Resolution is that agricultural products affected by depression shall in this respect be included in

the class of most favored commodities, to such extent as may be "compatible with the maintenance of adequate transportation service." Other sections of the Interstate Commerce Act must be borne in mind in determining the lowest lawful rates in a particular situation. The Resolution is in effect a direction to the Commission to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the Interstate Commerce Act and the carrier's rights under the Constitution. Section 1 of the Act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between the minimum charge that can be made for the service and permit the carrier to live, and the maximum charge that can be borne by the shipper. The legislature or its administrative agent may not make rates so as to confiscate the carrier's property. The carrier on the other hand may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, is the minimum of legislative power and the maximum of the carrier's power. Between these limits lies a zone, indefinite and variable, a "zone of reasonableness," within which any rate is just and reasonable to the carrier, as well as just, fair, and reasonable to the shipper that utilizes the carrier's services. The Commission concludes that "the lowest possible lawful rates" which it may prescribe under the Resolu-

tion on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in the Commission, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service.

The Resolution itself, by the use of the words "*lowest* possible lawful rates," recognizes that there may be more than one lawful rate, that there is a "zone of reasonableness."

That there are flexible limits to the Commission's discretion in the prescription of rates for future application results from the fact that there is no way by which it may be determined with mathematical accuracy just how much a particular rate should be. As expressed in *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 550, "there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer."

The Act requires that all rates shall be just and reasonable and reposes authority in the Commission to determine and prescribe rates which meet that standard. (Sec. 1 (5); Sec. 15 (1).) But since it is impossible to determine with accuracy what rates are just and reasonable, that question is left to the judgment and discretion of the Commission. Its judgment is to be formed from the evidence; and its conclusion is accepted as final when its action is not arbitrary or otherwise unlawful.

To quote again from the *Union Pacific* case (p. 550):

> With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. [Here the Court uses the language above quoted.] Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.

In other cases this Court has recognized the zone of reasonableness and the wide range of discretion in the exercise of the power to prescribe reasonable rates. *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 524; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 598–599; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605, 608.

The broad discretion of the Commission in fixing rates is, of course, within the control of Congress. Section 15a is a prominent example of such congressional control. That section directs that the Commission, "in the exercise of its power to prescribe just and reasonable rates * * * shall initiate, modify, establish or adjust such rates so that carriers as a whole * * *" will earn a fair return. In pursuance of that section, the Commission pre-

scribed increases in rates ranging from 25 to 40 per cent.

Likewise, the Hoch-Smith Resolution controls the Commission's discretion to the extent that the resolution directs "the lowest possible lawful rates compatible with the maintenance of adequate transportation service." The direction of the Resolution is evidently, like that of Section 15a, to be carried out by the Commission in the exercise of its power to prescribe just and reasonable rates.

The Resolution, indeed, sets no new standard of lawfulness, since it did not contemplate that any rate should be fixed under it which would not have been a lawful rate under prior law. But it recognized that the fixation of any particular rate within the zone of lawfulness depended upon the relative weight which the Commission might give to the various factors which are normally considered in ratemaking. The Resolution recognizes, both as a legal and a factual possibility, that there may be a lowest possible lawful rate, and, conversely and necessarily, a highest possible lawful rate. The Resolution now directs the Commission to give such relative weight to the above-mentioned factors entering into the determination of a reasonable rate as will produce the lowest possible lawful rate compatible with the maintenance of adequate transportation service. By the Resolution the Commission is directed to prescribe rates on a level at which prior to the Resolution the Commission would have

been justified in fixing them, though not obliged to fix them.

Under the Interstate Commerce Act, as it existed prior to the passage of the Resolution, the Commission could lawfully have reached the same result, upon the same considerations, as it did in this case.

The principle of rate making that consideration should be given to the value of the commodity and what the traffic will bear finds ample recognition in decisions of the courts as well as of the Commission. In *Kansas City Southern Ry.* v. *Carl*, 227 U. S. 639, 650, this Court said:

> The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law. Thus in *Gibbon* v. *Paynton*, 4 Burrows, 2298, it was said by Lord Mansfield (p. 2300): "His warranty and insurance is in respect of the reward he is to receive: and the reward ought to be proportionable to the risque." * * * This is an administrative principle in rate-making recognized as reasonable by the Interstate Commerce Commission, and is the basis upon which many tariffs filed with the Commission are made. *Matter of Released Rates*, 13 I. C. C. Rep. 550.

In one of the earliest cases decided by the Interstate Commerce Commission, *Imperial Coal Co.* v.

P. & L. E. R. R. Co., 2 I. C. C. 618, 636, it was held that:

> The value of the service is generally regarded as the most important factor in fixing rates. It furnishes theoretically, at least, a foundation for an equitable apportionment that takes into account all interests, those of the carriers, the owners of the property carried, and the public, as well as the dissimilarities of merchandise. * * * The value of the service to a shipper in a general sense is the ability to reach a market and make his commodity a subject of commerce.

The factor of the value of the commodity was emphasized in the following, among many other, decisions of the Commission: *In the Matter of Released Rates*, 13 I. C. C. 550, 560; *Metropolitan Paving Brick Co.* v. *Ann Arbor R. R. Co.*, 17 I. C. C. 197, 203; *Hafey* v. *St. L. & S. F. R. R. Co.*, 15 I. C. C. 245, 246; *Darling & Co.* v. *B. & O. R. R. Co.*, 15 I. C. C. 79, 81; *Investigation of Advances in Rates on Grain*, 21 I. C. C. 22, 35; *Advances in Rates—Western Case*, 20 I. C. C. 307, 355; *Lumber Rates from Memphis to New Orleans*, 27 I. C. C. 471, 480.

The underlying theory was clearly stated by Commissioner Lane in *Investigation and Suspension Docket 26*, 22 I. C. C. 604, 623, in which he pointed out that, in all classification, consideration must be given to the advantage to the community of having some kinds of freight carried at a less rate than other times:

And this is the true meaning of the phrase "what the traffic will bear." It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use. In this sense what the traffic will bear and the value of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs that it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one may reasonably bear a higher rate than the other upon public grounds.

It is submitted that there is no basis in the record for appellants' assertion that the Commission construed the Resolution as authorizing it to reduce a

"reasonable" rate, or that it regarded the rates which it reduced by the order here involved as "reasonable."

The finding of Division 1 in the earlier proceeding certainly furnishes no foundation for this assertion. The merely negative finding therein (100 I. C. C. 108) that the "rates assailed are not unreasonable or prejudicial as alleged" was not one which would preclude the Division or the full Commission from later making a different finding. There would be no presumption that these rates, even though not unreasonable as of the date of the hearing of the earlier case in 1923, were not unreasonable as of the date of the filing of the new complaint in December, 1926, or the date of the hearing of that complaint in March, 1927. "Transportation conditions are not static." (*Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 568.) In the hearing on the second complaint the case was tried *de novo,* and a more comprehensive showing was made. It was shown that important changes in conditions had taken place since the hearing in the prior case. These changes are summarized in the Commission's report. (R. 57–58.) Among them were the following: There had been a further increase in the volume of movement—an important element in rate-making—from a total of 69,777 cars in 1923 to 86,795 cars in 1925 and 78,803 cars in 1926. The financial condition of the carriers principally concerned had further improved. The depression in

the deciduous fruit industry had continued unabated for a further period of three years and conditions were worse in 1926 than in 1923; in the former decision Division 1 had found that the record did not justify the conclusion that the unfavorable financial conditions were likely to continue. In the later case the deciduous fruit growers offered to submit to an increase in the carload minimum weight on grapes from 26,000 pounds to 30,000 pounds.

Further, there was a much more comprehensive rate showing in the second hearing than in the first. Some of the additional evidence is: Comparison of the deciduous fruit rates assailed with the rate on bananas and cocoanuts from New Orleans and other Gulf ports to Portland, Oreg., Spokane and Seattle, Wash., Vancouver, B. C., and Los Angeles and San Francisco, Calif. (R. 32–33); with the rates on banasas from New Orleans and other Gulf ports to destinations in eastern trunk-line, central freight association, and western trunk-line territories (R. 33); with the rates on pineapples from Jacksonville, Fla., and the Gulf ports to Pacific Coast points (R. 33); with the rates on peaches and other deciduous fruits, concord grapes, cantaloupes, green vegetables, bananas and cocoanuts from various origins in the South and Southwest to destinations in eastern trunk-line, central, and western trunk-line territories. (See

the testimony of witness Ackerman, R. 243–280; 319–320, and his exhibits 62 to 101, inclusive.)

Certainly, the Commission made no finding in this case that the rate set aside was reasonable. Appellants' assertion that it was reasonable is a pure assumption.

While Section 1 of the Interstate Commerce Act provides that all rates "shall be just and reasonable," those terms are not defined in the Act, and there are no definite criteria provided therein by which the Commission may measure what is the reasonable rate upon a particular commodity. Congress conferred upon the Commission, its administrative agency, the legislative power to make rates for the future, and since no guide was given other than the general indefinite terms "just and reasonable," the discretion vested in the Commission is a broad one. Likewise, what is called the "zone of reasonableness" is wholly indefinite and may be regarded as simply expressive of the impossibility of exactitude in fixing particular rates. It is left to the Commission to determine, by the exercise of its expert and informed judgment, that which is not determinable by any mathematical or other definite formula. The question in each case in which an existing rate is assailed as unreasonable is whether that rate is too high according to all applicable legislative tests.

Apart from terminology, therefore, the question is what tests Congress has laid down for the deter-

mination of any particular rate. The Hoch-Smith Resolution was a part of the body of law under which in this case the Commission was acting. If the Commission correctly construed the Resolution as stating an additional test in accordance with which it should exercise its discretion in determining whether an existing rate on agricultural products should be reduced, it was warranted in finding that any rate which did not accord with that test was unreasonable and in setting it aside.

We submit that the Commission's finding that the rate here assailed was unreasonable, whether that finding be deemed to have been made under Section 1 of the Act alone or under the Act as supplemented by the Hoch-Smith Resolution, is entitled to the same sanction of conclusiveness as would have been a finding of unreasonableness in a nonagricultural case under the law as it existed prior to the Resolution.

In *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, this Court said (p. 313):

> The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that

> of the legislature or of the railroad commission exercising its delegated power. * * * The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements.

There is nothing in the *Willamette Case* (*Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433) or the *Passenger Scrip Case* (*United States* v. *New York Central R. R. Co.,* 263 U. S. 603) which is contrary to the Commission's conception of its power as exercised in this case.

In the *Willamette Case* there was no evidence whatever before the Commission to show that the existing rate was unreasonable, and, indeed, it was admitted by counsel for the shippers to be reasonable. The Commission set it aside for the avowed reason that, because the lumber industry had been built up upon the expectation of the continuance of a lower rate, which was admitted to be unreasonably low, the carriers should be deemed estopped from increasing it. That case was distinguished by this Court on the above ground in *Interstate Commerce*

Commission v. *Union Pacific R. R.*, 222 U. S. 541, 554. There the Court upheld an order of the Commission reducing the rate on lumber from the Pacific northwest to points in the middle west. The order was asserted to be void because "the Commission was influenced solely by a consideration of the effect of the advance in rates on the lumber industry." The Court said (p. 554):

> It is true, also, that the Commission examined into the effect of the old and the new rate on carrier and lumber men alike. But we do not find that it made the order because of the effect on the lumber industry. In the *Willamette Case* (219 U. S. 445), counsel for the mill men admitted that the rate there under attack was reasonable in and of itself, but insisted that statements of officers and action of the carrier operated to estop the road from raising a low rate up to a reasonable rate.

In the *Passenger Scrip Case* the Commission construed the amendment in question as necessarily requiring a reduced rate, whereas that statute actually required a determination of what was just and reasonable exactly as in any other case arising under the Act. The amendment in question did not, as does the Hoch-Smith Resolution, add anything to the preexisting law with respect to the determination of a reasonable rate.

We submit that the Commission properly construed the third paragraph of the Resolution as entering into the prescribed legislative standard for the determination of the reasonableness of rates on agricultural products suffering from depression and as meaning that a rate above the lowest possible lawful rate compatible with the maintenance of adequate transportation facilities must be deemed an unreasonable rate with respect to such commodities. The fact that Congress had not theretofore attempted to control the discretion of the Commission with respect to the weight to be accorded to the various factors which enter into the determination of the reasonableness of particular rates does not detract from the effect of such a direction when it was given.

Congress manifestly intended the Commission to apply the test which it formulated in the Resolution. As Congress did not alter the procedural provisions of the Interstate Commerce Act, it must be supposed to have intended that the application of the mandate of the Resolution should be through a finding that rates which did not accord with the test there laid down should be deemed unreasonable and set aside.

The appellants' construction of the Resolution (brief, pp. 61–64) would deprive the words "lowest possible lawful rates compatible with the maintenance of adequate transportation service" of any

substantial effect. Appellants construe the Resolution as if it stopped at the end of the second paragraph. That it did require a general comprehensive investigation of the entire rate structure of common carriers with a view to remedying defects and injustices in rates on all commodities is true. It is also true that in the course of that investigation agricultural products, among others, would be considered, and by the second paragraph the Commission was required "from time to time, and as expeditiously as possible," to make such decisions and orders as might be necessary or appropriate "in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates." If, as appellants contend, rates on agricultural products suffering from depression were to be determined by no different tests than they would have been under the Interstate Commerce Act apart from the Resolution, there was no need for Congress to go farther than the second paragraph. But Congress did go farther and prescribed a formula for the fixing of rates on agricultural products, "the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Appellants' argument that the word "lawful" contemplates that no alteration of rates may be made pursuant to the Resolution which would not

have been made without it, is to cause that word to vitiate the effect of all the rest of the phrase. If Congress had intended what appellants conceive it did, the third paragraph would have been wholly unnecessary. But in the third paragraph Congress not only laid down a criterion, but in terms recognized that it had done so. In the proviso at the end of the paragraph Congress directs that the investigation contemplated by the Resolution shall not be permitted to delay the decision of pending cases involving rates on agricultural products *"and that such cases shall be decided in accordance with this resolution."* This language is utterly meaningless on any assumption other than that Congress had laid down a rule, in addition to the general rule embodied in the Interstate Commerce Act, in accordance with which particular pending cases involving agricultural products could and should be decided.

Much the same argument as to the Commission's misconstruction of the directions of Congress was made by the appellants in the *New England Divisions Case,* 261 U. S. 184. That was a proceeding by New England carriers to secure larger divisions of certain joint rates which had been increased by the Commission in a former proceeding. The Commission granted them increased divisions, which necessarily reduced the receipts of the western

lines. The Commission's order was based on Section 15 (6) of the Interstate Commerce Act, added by the Transportation Act of 1920, which empowered the Commission to prescribe "just, reasonable, and equitable divisions" of joint rates to be received by the several carriers, and then contained the following direction, which may be compared with that embodied in the Hoch-Smith Resolution.

> In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

This Court held that the Commission was justified in determining such divisions to consider the financial needs of particular carriers, in order to maintain them in effective operation as part of the trans-

portation system. This Court said (pp. 189, 193–195):

> *First.* It is contended that the order is void, because its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 443. But the order here assailed is not subject to that infirmity.
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> * * * * *
>
> Plaintiffs insist that Transportation Act, 1920, did not, by its amendment of § 15 (6) change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had, therefore, been the Commission's practice to consider all the factors enumerated in § 15 (6); that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the enquiry into divisions on the Commission's initiative; that this authority was conferred in order to protect the short lines, which, because of their weakness, might refrain from making complaint,

for fear of giving offence; and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by § 400 of Transportation Act, 1920, which declares that they shall establish "in case of joint rates * * * just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers." * * * But Congress had, also, the broader purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new § 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of such carriers"; just as by new § 15 (3), page 485, the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates."

THE LEGISLATIVE HISTORY OF THE RESOLUTION

The history of the Hoch-Smith Resolution tends to confirm, rather than to weaken, the Commission's construction.

Appellants' statement of the legislative history (Brief, pp. 53–61), as distinguished from their subsequent argumentative interpretation thereof (Brief, pp. 61–68), is substantially accurate, though

for completeness we set forth in the margin reference to the entire history.[1]

Brief reference may be made to the events leading up to the passage of the Resolution.

During the period of Federal control there had been a nation-wide increase of 25% in freight rates

[1] The following are complete references to the legislative history of the Resolution, the figures in italics being the page numbers of Vol. 65, Cong. Rec.:

346, H. J. Res. 94 introduced and referred to Committee on Interstate and Foreign Commerce; *1071*, H. J. Res. 141 introduced and referred to same committee; *4780*, S. J. Res. 107 introduced and referred to Committee on Interstate Commerce; *5120*, report of Committee on Interstate Commerce on S. J. Res. 107 submitted, Senate Report No. 313, 68th Cong., 1st Sess., Mar. 28, 1924; *8336–8337*, S. J. Res. 107 debated in Senate as in Committee of the Whole and passed; *8456*, S. J. Res. 107 received in House and referred to Committee on Interstate and Foreign Commerce; *8497*, report of Committee on Interstate and Foreign Commerce on H. J. Res. 141 submitted and referred to the Committee of the Whole House on the state of the Union, House Report No. 735, 68th Cong., 1st Sess., May 13, 1924; *9675*, report of Committee on Interstate and Foreign Commerce on S. J. Res. 107 submitted and referred to the Committee of the Whole House on the state of the Union, House Report No. 867, 68th Cong., 1st Sess., May 27, 1924; *11018–11026*, S. J. Res. 107 debated in House, and, as amended, passed; *11124*, Senate disagreed to House amendments of S. J. Res. 107 and conferees appointed; *11220*, House insisted on its amendments of S. J. Res. 107, and conferees appointed; *11245–11246*, Conference Report on S. J. Res. 107 debated in House and agreed to, House Report No. 1023, 68th Cong., 1st Sess., June 7, 1924; *66* Cong. Rec. *2501*, conference report on S. J. Res. 107 agreed to; *66* Cong. Rec. *2747*, S. J. Res. 107 approved by the President.

effective June 25, 1918, which followed a percentage increase of 5% in 1917, and a later percentage increase of 15% in the territory east of the Mississippi and north of the Ohio and Potomac rivers. (*Fifteen Percent Case*, 45 I. C. C. 303.) Later, on July 29, 1920, the Commission, pursuant to the Transportation Act of 1920, and especially to Section 15a thereof, authorized nation-wide increases in freight rates of 40% in the Eastern group, 35% in the Western group, 25% in the Southern and Mountain-Pacific groups, and 33⅓% in intergroup rates. (*Increased Rates, 1920,* 58 I. C. C. 220.)

It was early apparent that the above-mentioned flat horizontal increases in rates bore with peculiar severity on agricultural products, because their bulk was out of all proportion to their value.

In 1921 Congress created a Joint Commission of Agricultural Inquiry to investigate and report to Congress upon the causes of the condition of agriculture, the comparative condition of industries other than agriculture, and various other phases of the agricultural situation, including the marketing and transportation facilities of the country. (Senate Concurrent Res. 4, 42 Stat., Part 2, 1807.)

The report of the Joint Commission was submitted October 15, 1921, House Report 408, 67th Congress, 1st Session, in four parts, part 3 of which relates to transportation. The Joint Commission made the following recommendations, among others (Pt. 3, p. 3):

1. That the transportation rates on many commodities, more especially the products of agriculture, *bear a disproportionate relation to the prices of such commodities;*[1] that there should be immediate reductions in transportation rates applied to farm products and other basic commodities; and that reductions in rates upon the articles of *higher value,* or upon tonnage moving upon so-called "class rates," are not warranted, while the rates upon agricultural products and other basic commodities remain at their existing levels; that greater consideration should be given in the future by public rate-making authorities and by the railroads in the making of transportation rates *to the relative value of commodities* and existing and prospective economic conditions.

2. That the pyramided per cent advances in rates which have been authorized by the Interstate Commerce Commission or made by the United States Railroad Administration caused the dislocation of long-standing rate relationships between rates upon agricultural and industrial products between competitive enterprises and competitive sections of the country; that the railroads and the public rate-making bodies should seek to readjust rates of the country so as to preserve so far as practicable the general relationship of rates existing prior to 1918, with due regard to present and future changes in economic conditions.

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[1] All italics in this brief are ours unless otherwise stated.

> 3. That in establishing the general level of rates and commodity and class rates the Federal and State regulatory bodies give greater consideration to existing and prospective economic conditions and to the relationships existing between the *price level of commodities* and the *level of transportation rates* as well as the relationship existing between the price of different commodities, the weight of such commodities, and the space required for their transportation.

After the United States Chamber of Commerce had on November 14, 1923, made a report on the general subject (referred to in the Report of the House Committee on Interstate and Foreign Commerce, quoted in appellants' brief, p. 57), President Coolidge, in his message to Congress on December 6, 1923, said (p. 7):

> Competent authorities agree that an entire reorganization of the rate structure for freight is necessary. This should be ordered at once by the Congress.

From the historical background of the Resolution and its legislative history, as traced in appellants' brief, we submit that it is plain: (1) that the impetus for the Resolution was found in the maladjustment of the structure of freight rates due to unscientific horizontal increases; (2) that the purpose of the Resolution was to remedy defects in the rate structure so as to give due regard to the comparative levels of market values of different kinds

of commodities; and (3) that agricultural products, being conspicuous examples, known to Congress, both of the maladjustment of the existing structure and the necessity of a remedy, were made the subject of special directions by Congress to the Commission.

THE COMMISSION PROPERLY CONSTRUED THE RESOLUTION AS APPLICABLE TO PARTICULAR CASES INVOLVING AGRICULTURAL PRODUCTS

The appellants (Brief, pp. 128–131) contend that—

> The Commission misconstrued the Resolution in that it applied it in an isolated proceeding involving a rate on a particular commodity from a single state, while the Resolution is intended to be applied only in a general investigation into the general rate structure of the country.

The comprehensive and exhaustive character of that investigation, which the Commission instituted, on March 12, 1925, upon its own motion, docketed and entitled No. 17000, *Rate Structure Investigation,* appears in the Commission's Notice to the Public of March 12, 1925. (R. 518–522.)

In the Commission's 39th Annual Report to Congress (1925), under the heading "Hoch-Smith Resolution," pages 37 to 41, a full account is given of the action taken by the Commission in pursuance of the Resolution. It is stated that—

> The task assigned to us by the resolution is one of magnitude which will take time to complete (p. 41).

Full accounts of the progress made in the general investigation are given in subsequent annual reports to Congress, as follows: 40th Annual Report (1926), pages 36 to 41. 41st Annual Report (1927), pages 67 to 72. 42nd Annual Report (1928), pages 63 to 68.

The investigation has been divided into 11 parts, each part covering particular rates or classes of rates, part 2 covering western trunk-line rates; part 3, cotton; part 4, petroleum and petroleum products; part 5, furniture; part 6, iron and steel articles; part 7, grain and grain products from western territory; part 7-a, grain and grain products, southern territory rates; part 8, cottonseed, its products, and related articles; part 9, livestock; part 10, hay; part 11, sand and gravel. "The investigation will be extended to embrace other important commodities as rapidly as is possible with the appropriations and forces at our command." (1927 Ann. Rep., p. 72.)

> The Hoch-Smith resolution itself directs that our investigation shall be thorough and shall cover the entire rate structure of common carriers subject to the interstate commerce act. Such an investigation must inevitably consume a long period of time. *In fact, it must be continuous.* (1926 Ann. Rep., p. 38.)

In view of the magnitude of the undertaking and of the length of time which would necessarily be consumed in accomplishing it, it was not to be

supposed that Congress intended that relief, shown by a complainant in a formal complaint case to be due, should be withheld until the general investigation is completed. In July, 1926, the Commission, in the course of its report in *Revenues in Western District*, 113 I. C. C. 3, said (p. 36):

> Pending further progress in the investigation of the issues under No. 17000, parties are not debarred from what may prove to be the more expeditious and satisfactory course of presenting their grievances by complaint or of seeking the reconsideration of our former determinations which may control the situation.

That practice, which has been followed consistently ever since, does not appear to have been hitherto seriously questioned.

The proviso to the third paragraph of the Resolution expressly states:

> That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

We submit that the intention of Congress was not that this proviso should be a limitation on the power of the Commission to apply the tests prescribed in the Resolution in particular cases, but was rather to make it plain that those tests were to be applied in pending proceedings although they

had been instituted prior to the adoption of the Resolution. In view of the direction of the third paragraph of the Resolution that the required changes in the rate structure with respect to agricultural products should be effected "with the least practicable delay," no sufficient reason appears for ascribing to Congress an intent that the Resolution, while applying to pending proceedings, should not apply to proceedings affecting such products which might be thereafter commenced before the comprehensive investigation provided by the second paragraph could be concluded.

THE COMMISSION HAS CONSTRUED THE RESOLUTION IN HARMONY WITH, AND NOT AS IMPLIEDLY REPEALING, SECTION 15a OF THE INTERSTATE COMMERCE ACT

Appellants' contention that the Commission construed the Resolution as in effect repealing Section 15a of the Interstate Commerce Act is quite without merit. There is nothing in its report which lends color to such an assertion. Instead, there are frequent references to the requirement of the Resolution that the rates fixed pursuant to its terms must be compatible with the maintenance of adequate transportation service.

The Commission in other cases had already held squarely that there was no such repeal and that the Resolution must be construed and applied in harmoney with Section 15a.

One of the earliest cases in which the Commission had occasion to consider the Hoch-Smith Res-

olution was *Revenues in the Western District,* 113 I. C. C. 3. Counsel for various State commissions and other State interests contended, *inter alia,* (1) that the Resolution had the effect of repealing Section 15a of the Interstate Commerce Act; and (2) that the rates on agricultural products, including livestock, effective at the time of the approval of the Resolution, became in effect the legislative maximum rates on those commodities which might not be increased except upon a finding by the Commission or by the courts that those rates are confiscatory.

In its report the Commission discussed the force of the qualifying words "compatible with the maintenance of adequate transportation service," as used in the Resolution. "These are expressions," the Commission said (p. 12), "somewhat similar to those used by the Supreme Court in decisions rendered prior to the adoption of the resolution, specifically referring to the provisions of section 15a wherein Congress indicated that in determining what would be a fair return consideration should be given, among other things, to the transportation needs of the country and the necessity of enlarging such facilities in order to provide the people with adequate transportation," citing *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 190; and *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 478.

The Commission further said (pp. 11–13):

> * * * we are of the view that we are not debarred by the resolution from affording the carriers relief through the medium of a general increase in rates prior to the completion of the investigation under that resolution, if need for such action arises upon a clear showing of necessity. Both section 15a and the resolution must be given a construction which makes them practicable and workable. See *New England Divisions Case*, 261 U. S. 184, 197.
>
> With the contention that the resolution repeals section 15a we are not in accord. The resolution has the force and effect of an act of Congress. In it there is no specific repeal of any provision of existing law, and there is no reason for holding that the resolution by implication repealed or suspended the provisions of section 15a. * * *
>
> * * * * * *
>
> While confiscatory rates are unlawful, it does not follow that all rates which escape confiscation are lawful. As we construe the resolution, it does not prevent increases of rates on all livestock or on all products of agriculture which are above the point of confiscation.

Section 15a is itself subject to the following express proviso:

> *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be un-

> just or unreasonable, and to prescribe different rates for different sections of the country.

The necessity for such an exception is apparent, for, in the absence of the power therein preserved, the Commission would be precluded from reducing any rate no matter how unreasonable or unjust it might be to the shipper, solely on the ground that the carrier was not earning a fair return from all of its rates. Since the carrier might never be able to earn such a fair return the shipper might be perpetually denied his right to a reasonable rate.

In *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, this Court, speaking of Section 15a, said that, having regard to the property rights of the carriers and the interests of the shipping public, the validity of the plan embodied in that section depended upon two propositions, the first of which was (p. 480):

> Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section.

The Court then added:

> It should be noted that, in reaching a conclusion, upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not

> require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. *In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all.*

Later in the opinion, p. 483, it was said:

> There is nothing in the act requiring the use of the net return as evidence to fix a particular rate. As we have already pointed out, paragraph 17, § 15a, gives fullest latitude for evidence on such an issue.

It follows that the Commission may reduce a particular rate or a class of rates which it finds to be unreasonable, and in making its determination need not consider the total net return at all.

THE COMMISSION GAVE NO UNDUE WEIGHT TO THE DEPRESSED CONDITION OF THE INDUSTRY

The Commission clearly did not construe the Resolution as authorizing it to reduce a rate "solely" or "merely" because of such depression, or because of the inability of the shippers to conduct their business at a profit, as appellants charge. (Brief, p. 143.)

The Commission did indeed give consideration to the economic condition of the industry. Its discussion of that subject in its report is found at pages 21–25 of the Record. This discussion would have been germane in any proceeding, and apart

from the Resolution, for it bears directly upon the value of the commodity and what the traffic will bear, which, as we have shown, has always been regarded as a legitimate subject of inquiry. Under the Resolution consideration of the economic condition of the industry was necessary to ascertain whether the facts brought the case within the application of the third paragraph thereof.

The Commission said (R. 21):

> The growing and shipping of deciduous fruits is one of the great basic industries of California, and as such is an important factor in the prosperity of the State *and of the carriers which serve it.*

Taking the Commission's report as a whole, we submit that it is clear that the Commission did not base its action solely on the depressed condition of the industry. That was only one of the matters considered along with a great many others. It was not error to give consideration to the economic or industrial conditions, along with the other evidence. *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 553–555; *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219; *McLean Lumber Co.* v. *United States*, 237 Fed. 460, 470; *Southern Pac. Co.* v. *United States*, 197 Fed. 167 (second *Willamette Valley case* in which the Commission's order was sustained by the Commerce Court, no appeal being taken to this Court).

The position of the Commission with respect to the weight to be given, under the Resolution, to the

economic condition of the industry has been clear and consistent.

In *Revenues in Western District*, 113 I. C. C. 3, already referred to as one of the first cases under the Resolution, decided July 14, 1926, the Commission said (p. 30):

> In various cases since the postwar depression began we have had occasion to consider the economic condition of the agricultural and livestock industries. In *National Live Stock Shippers League* v. *A., & S. F. Ry. Co., supra* [63 I. C. C. 107], decided August 3, 1921, the record established that the livestock industry was in a serious condition. In *Rates on Grain, Grain Products, and Hay, supra* [64 I. C. C. 85], decided October 20, 1921, we found that the grain-farming industry was in a state of financial prostration. In *Reduced Rates, 1922, supra* [68 I. C. C. 676], decided May 16, 1922, we noted that the serious situation in agriculture obtaining in 1921 has improved. In *Rates and Charges on Grain and Grain Products, supra* [91 I. C. C. 105], decided July 10, 1924, we found that the agricultural industry, both in the western group and in the remainder of the country, was in a somewhat better economic condition, although still unsatisfactory, than in 1921. We said:
>
> "In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may permanently or for a long period of time affect

> the ability of that industry to pay the rates assessed, *but taken by itself it can not be accepted as controlling.*

Decisions of the Commission in other cases decided after the passage of the Resolution further demonstrate that the Commission has not interpreted the Resolution as authorizing it to reduce rates solely on the ground of economic depression. In *Milk and Cream between New England Points,* 126 I. C. C. 38, it was shown that the dairying industry of New England was operating under depressed conditions. Nevertheless the Commission allowed the carriers to increase their rates on milk and cream. In *American National Livestock Asso.* v. *A., T. & S. F. Ry. Co.,* 122 I. C. C. 609, it was shown, as stated in the report, page 615, that "While the condition of the livestock industry has materially improved since the period of extreme depression the recovery has by no means been complete. The industry is still suffering from depression, although not in all branches and not in the same degree as heretofore * * *." Notwithstanding the depression the Commission declined to order reductions in many of the rates involved, although it did in some.

Other cases in which, although the Hoch-Smith Resolution was invoked, the Commission has found the rates assailed not unreasonable and has declined to reduce them are: *Cream and Related Articles,* 115 I. C. C. 447, 450; *Minnesota-Dakota Transit Millers* v. *A. A. R. R. Co.,* 118 I. C. C. 585, 596–597;

Unmanufactured Tobacco from Kentucky, 126 I. C. C. 93, 95; *Aberdeen Commercial Club* v. *Camas Prairie R. R. Co.*, 126 I. C. C. 498.

The Commission also discussed (R. 48–49) the evidence introduced by the appellants themselves in an attempt to show that a rate reduction would not afford permanent relief to the deciduous fruit industry. Evidence tending to show the effect of a rate reduction sought by shippers, or voluntarily made by a carrier, upon the industry in which the shipper is engaged, as well as evidence bearing upon the effect of the proposed reduction upon the finances of the carriers, is frequently introduced in rate hearings before the Commission. It is entirely proper that the Commission should consider such evidence; and it has never been held by this Court that to do so renders the Commission's orders invalid, so long as the Commission confines itself "to the exercise of its statutory powers to fix rates." *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 554; *Texas & Pacific Ry.* v. *Interstate Commerce Commission* (*Import Rate Case*), 162 U. S. 197, 219.

Appellants' assertion (Brief, p. 99) that "the Commission erroneously construed the provisions of the Resolution respecting 'freedom of movement by common carriers of the products of agriculture affected by that depression' to mean that notwithstanding a long, steady and 'enormous increase in the tonnage of such fruits' in interstate commerce,

freedom of movement did not exist unless the shippers were making a profit," is likewise unfounded. The passage of the report (R. 48) to which appellants refer (Brief, p. 104) is a discussion of the contentions of the opposing parties respecting the question of the freedom of movement.

The Hoch-Smith Resolution directs the Commission to effect such lawful rate changes *as will promote* the freedom of movement of the specified products at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. Freedom of movement may be imperilled by high freight rates even though it has not yet ceased. The Commission found that the rates complained of were unreasonable to the extent that they exceeded the prescribed rates, and that the prescribed rates "are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture." (R. 59.) These findings were responsive to the directions of Congress.

THE COMMISSION DID NOT CONSTRUE THE RESOLUTION AS DIRECTING IT TO FIX RATES ONLY "SLIGHTLY IN EXCESS OF OPERATING EXPENSES"

It is repeatedly stated by appellants (Brief, pp. 36, 37, 43, 69, 70, 122, 123, 124, 173, 176, 187, 190), that "the Commission misconstrued the Resolution

in that it held that a rate which yielded the carrier an amount slightly above operating expenses was a lawful rate."

The quoted phrase "slightly in excess of operating expenses," which appellants reiterate in their brief, is taken from a sentence of the supplemental report of the Commission (R. 67), which reads in full as follows (R. 67):

> In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers.

Immediately following this sentence, however, the Commission says:

> But we have not accepted the cost study as indicating precisely the actual expense of handling this traffic.

And the Commission then proceeds to explain the reasons why it has not accepted the cost study. This quotation, therefore, is no foundation for appellants' contention that the rates prescribed by the order of the Commission were regarded by it as only "slightly above operating expenses."

Moreover, the Commission's conception of the scope of the phrase "operating expenses" is clearly shown by the fact that the Commission quoted with

approval (R. 26–27) from its former decisions, in *Grain and Grain Products,* 122 I. C. C. 235, 264, involving proposed increased rates on grain in the west, and in *American National Livestock Asso.* v. *A., T. & S. F. Ry. Co.,* 122 I. C. C. 609, 617, relating to the rates on livestock throughout the west. In the latter case the complainants contended that the logical basis for ascertaining the lowest possible lawful rates under the Hoch-Smith Resolution is the cost of the service and that the pre-war rates on livestock would yield a very substantial profit above the average unit costs of handling. "Apparently complainants assume that in any such computation of profit only expenses directly attributable to the traffic need be considered and that livestock need not contribute to such maintenance-of-way expenses as are occasioned by depreciation, decay, floods, or storms, or assist in defraying general expenses, taxes, or transportation expenses not incurred in a particular service." In reference to this contention, the Commission said (p. 617):

> The Hoch-Smith resolution, however, enjoined upon us to fix the lowest possible rates that might lawfully be required, compatible with the maintenance of adequate transportation service. It set no new standard of lawfulness, but said, in effect, that to the extent that there are flexible limits to our discretion we should fix the lowest rates falling within those limits. In the past we have had occasion to consider at times what may be called "out-of-pocket" cost, but while it

has been contended that the carriers might voluntarily, in certain situations, establish rates covering only such cost, it has never been seriously contended that we could lawfully require this to be done. Rates that we may lawfully require must in principle be high enough to cover all the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605. We say "in principle" because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates. Of course, the other sections of the interstate commerce act must also be borne in mind in determining the lowest lawful rates in a particular situation.

Practically the same language was used in the *Grain and Grain Products Case,* and in both cases the decisions of this Court in *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, and *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605, were cited.

From this it is plain that the Commission in using the phrase "plus at least some margin of profit" did not mean a slight or unsubstantial profit, or profit less than a fair profit in all the circumstances, though the Commission recognized, as does this Court, that the ratemaking body has "a wide range of discretion in the exercise of the power to pre-

scribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business." (263 U. S. pp. 598–599.) And it is likewise plain that by the phrase "all the costs that may fairly be allocated to the service" or the phrase "operating expenses," the Commission did not mean only "out-of-pocket" costs, but meant all the costs which the cited decisions of this Court require to be included.

II

The Hoch-Smith Resolution is a Valid Exercise of the Power of Congress to Regulate Commerce

THE RESOLUTION DOES NOT CONTEMPLATE CONFISCATORY RATES AND IS NOT OTHERWISE VIOLATIVE OF THE FIFTH AMENDMENT

The third paragraph of the Resolution directs the Commission to fix the "lowest possible *lawful* rates compatible with the maintenance of adequate transportation service."

In order to be "lawful," a rate must be nonconfiscatory. Where the question is as to an entire schedule of rates, the total revenue from all the rates must yield a fair return upon the reasonable value of the property of the carrier devoted to transportation service. *Smyth* v. *Ames*, 171 U. S. 361, 365; *Minnesota Rate Cases*, 230 U. S. 352, 434; *San Diego Land Co.* v. *National City*, 174 U. S. 739. But where, as in the case at bar, there is involved only the rate applicable to a part of the com-

pany's business, the rate must be high enough to cover all the cost of the service performed under it, including not only the expenditures incurred exclusively for that traffic—sometimes called the "direct" or "out-of-pocket" costs—but also a just proportion of the expenses incurred for all traffic of which that in question forms a part; and the rate must also allow a fair profit above such costs. *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 421; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 596–597; *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, 301; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605; *Northern Pacific Ry.* v. *Department of Public Works*, 268 U. S. 39. Compare *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 480–483; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 549.

This test is implicit in the term "lawful rates" as used in the Hoch-Smith Resolution.

A constitutional argument quite analogous to that of the appellants herein was thus answered in the *New England Divisions Case, supra* (p. 195):

> *Second.* It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the

services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share?—It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom.

It has been repeatedly recognized in decisions of this Court that with respect to rates on particular commodities there is a wide field of legislative discretion which permits variety and classification. *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605; *Vandalia R. R. Co.* v. *Schnull,* 255 U. S. 113; *Southern Pacific Co.* v. *Campbell,* 230 U. S. 537; *Atlantic Coast Line* v. *N. Car. Corp. Comm.,* 206 U. S. 1; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota,* 186 U. S. 257.

As expressed by this Court in *Northern Pacific Ry.* v. *North Dakota, supra* (pp. 598–599):

> The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and *it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business.* There are many factors to be considered,—differences in the articles transported, the care required, the risk assumed, the value of the service, *and it is obviously important that there should be reasonable adjustments and classifications.* Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic.

In *Southern Pacific Co.* v. *Campbell, supra,* this Court said (p. 552):

> The conditions of traffic, the adjustment of rates with respect to the different commodities transported, and the appropriate basis for *classification,* were subjects for the consideration of the commission * * *.

Railroad freight rates from the beginning have been classified, rates on particular commodities being made lower than rates on other commodities depending upon the nature of the commodity, its

value, bulk, weight, and other elements; and there has been a wide range in the rates. An exhibit of record in the case at bar (Ex. 32, R. 238) shows the rates on 75 commodities from California to eastern points (admitted by the carriers to be a fair cross-section of the transcontinental rates), and they range from 74.5 cents per 100 pounds, applying on crushed or ground stone, to $2.70 per 100 pounds, applying on dry hides.

Even under the Fourteenth Amendment some special treatment of agriculture has been recognized as valid. *Liberty Warehouse Company* v. *Tobacco Growers.*, 276 U. S. 71, 96; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95. The power of Congress under the Fifth Amendment "admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary." *Second Employers' Liability Cases*, 223 U. S. 1, 53.

In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, in which the constitutionality of the "commodities clause" of the Act to Regulate Commerce (now Paragraph 8 of Section 1, Interstate Commerce Act) was sustained, it was contended that the statute was void because discriminatory, in that it exempted from its provisions "timber and the manufactured products thereof." The purpose of the exemption was primarily to make the clause

inapplicable to lumber tap lines in the south and southwest, owned or controlled by lumber companies. (See *Tap Line Cases*, 234 U. S. 1, 27.) The Court said (pp. 416, 417):

> Without elaborating, we hold the contention that the clause under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, *we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike.* It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a *discrimination* between carriers.

If it be contended that the reduction of rates on agricultural products must necessarily result in increasing rates on other commodities above those which would otherwise obtain, it may be answered that this is but a normal incident of reasonable classification and it may also be questioned whether appellants have any standing to advance such an argument. As this Court said in *Dayton-Goose*

Creek Ry. v. *United States,* 263 U. S. 456, 484, upholding the constitutionality of the recapture provisions of the Transportation Act of 1920:

> It is then objected that the Government has no right to retain one-half of the excess, since, if it does not belong to the carrier, it belongs to the shippers and should be returned to them. If it were valid, it is an objection which the carrier can not be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid.

See also *Southern Ry. Co.* v. *King,* 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550; *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 576; *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71, 88. With respect to the suggested danger of discrimination between particular commodities or localities, it has been shown that the Commission construes the Resolution as requiring rates not violative of any of the provisions of the Interstate Commerce Act. Inasmuch as Sections 2 and 3 of that Act prohibit *unjust* discrimination and *undue* and *unreasonable* preference or prejudice, it is not to be presumed that the Commission, in fixing rates in accordance with the directions of the Resolution, will prescribe unjustly discriminatory or unduly preferential or prejudicial rates.

It is submitted that appellants' constitutional argument based on the Fifth Amendment is not essentially different from that which inheres in

many ordinary rate cases. The Hoch-Smith Resolution, on its face, does not call for confiscatory rates. The Commission has not construed the Resolution as contemplating confiscation or an unsubstantial return. The argument to the contrary distorts the effect of isolated phrases in the report. The real complaint of the appellants is that the Commission has decided wrongly on the facts and that the rates prescribed in its report actually result in confiscation. That is a question which may arise in any case and with respect to which the report of the Commission is entitled to all the presumptions in favor of its validity that ordinarily attach to the conclusions of that body.

THE HOCH-SMITH RESOLUTION IS A VALID EXERCISE OF THE POWER TO REGULATE COMMERCE. IT IS NOT AN ATTEMPTED REGULATION OF INDUSTRY, AND DOES NOT GRANT "BOUNTIES," "SPECIAL PRIVILEGES," OR "SUBSIDIES"

Appellants argue that "the power of Congress under the commerce clause does not extend to the regulation of industrial conditions under the guise of regulating rates, and such power could not be delegated by Congress to the Commission." (Brief, p. 160.)

The Resolution, according to its title, is a direction to the Commission to "take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges." It is a measure for the regulation of rates for transportation in interstate commerce, and that only.

The regulation of industry is one thing and the regulation of rates another, but here no attempt is made to regulate industry; the provision merely directs that industrial conditions shall be considered in regulating rates, and then only "in so far as it is legally possible to do so." The purpose of Congress, as shown by the Resolution itself, by the conditions which led to its passage, and by its legislative history, was to regulate rates and promote the free movement of commodities.

As stated in *Texas & Pacific Ry.* v. *Interstate Commerce Commission* (*Import Rate Case*), 162 U. S. 197, 219:

> Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable,* that discrimination must not be *unjust,* and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable,* necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act. (Italics the Court's.)

In the interests of maintaining a comprehensive transportation system, of which weak roads as well as strong ones were essential component parts, this Court has upheld the provisions of the Transportation Act of 1920 for the recapture of the excess income of the strong carriers and the devotion of a part of it to the financial needs of the weak ones (*Dayton-Goose Creek Ry. Co.* v. *United States, supra*) and divisions of joint rates among a group of carriers, with special reference to the financial necessities of a part of them, which gave the needy carriers a relatively greater share to meet those necessities than would have been justified by relative lengths of haul (*New England Divisions Case, supra*). But, of course, the adequate regulation of commerce looks farther than the railroads. Appellants' view is too narrow. The purpose of securing the free movement in commerce of necessities of life is surely not less germane to the exercise of the power to regulate commerce than the preservation of the railroad systems over which those commodities move.

No one would contend that Congress has the broad power to regulate industry as such, but that is a far different thing from considering the welfare of industry, the support of the carriers, in its relation to interstate freight rates. Carriers and industry are interdependent; if one suffers, eventually the other will also. In the determination of reasonable and nondiscriminatory rates, the welfare not only of the carriers but also of the producers, ship-

pers and consumers may be considered. *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219.

A large part of appellants' argument against the constitutionality of the Resolution (Brief, pp. 143–172) is answered by the opinion in *Wilson* v. *New*, 243 U. S. 332, 358, 359, where the Court, speaking through Mr. Chief Justice White, said:

> When it is considered that no contention is made that in any view the enforcement of the act would result in confiscation, the misconception upon which all the propositions proceed becomes apparent. Indeed in seeking to test the arguments by which the propositions are sought to be supported we are of opinion that it is evident that in substance they assert not that no legislative judgment was exercised, but that in enacting the statute there was an unwise exertion of legislative power begotten either from some misconception or some mistaken economic view or partiality for the rights of one disputant over the other or some unstated motive which should not have been permitted to influence action. But to state such considerations is to state also the entire want of judicial power to consider them,—a view which therefore has excluded them absolutely from our mind and which impels us as a duty to say that we have not in the slightest degree passed upon them. While it is a truism to say that the duty to enforce the Constitution is paramount and abid-

ing, it is also true that the very highest of judicial duties is to give effect to the legislative will and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to influence our opinion or to control judgment.

See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 405, 416.

Whether the Hoch-Smith Resolution is economically sound, whether it expresses a wise policy, whether it is efficacious to acomplish the purpose sought, whether it is expedient, whether it will result in inconvenience or harm, are all matters within the legislative discretion, and are wholly irrelevant in determining the question of the constitutional power of Congress to enact the Resolution.

III

The Reductions in Rates Ordered by the Commission Are Supported by Substantial Evidence and Are Not Shown to Be Confiscatory

If appellants have failed to demonstrate that the order of the Commission was based on a mistake of law or beyond the statutory or constitutional power of the Commission, it remains to consider if the appellants have established convincingly (1) that the rates fixed by the Commission in the order assailed are confiscatory, (2) that the Commission acted so arbitrarily and unjustly as to fix said rates without any evidence to support its action or di-

rectly contrary to the evidence before it, and (3) that the Commission exercised its authority in such an unreasonable manner that the order assailed should be held void. *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547.

1. Upon the issue of confiscation, the appellants (complainants below) failed to meet the burden resting upon them in this suit "to establish the invalidating facts by definite and convincing proof." (*Allen* v. *St. Louis, Iron Mt. & Southern Ry.*, 230 U. S. 553, 560.) No evidence was presented in the court below except a certified copy of the proceedings before the Commission in which the order sought to be enjoined was made (R. 129) and three reports of the Commission in other cases (R. 514–523).

Upon this evidence, the court below (R. 100) found that "the contention that the reduced rate will compel the carriers to transport this class of freight at a loss, or without substantial reward, is without support in the record" (R. 100; 30 F. (2d) 940). That finding reinforces the Commission's order.

2. Did the Commission act so arbitrarily and unjustly as to fix the rates in question without evidence to support its action or directly contrary to the evidence before it?

The rule governing such a review is laid down in *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547–548, as follows:

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

A bare summary of the evidence singled out for special mention in the Commission's report will indicate the comprehensiveness of this evidence. Among the matters considered in arriving at the rates here assailed were the following:

Volume of movement (R. 18-19),
Weighted average haul (R 20),
Value of the commodity, as indicated by market prices (R. 22-23),
Ratio of transportation charges to value of commodity (R. 24),
History of the rates (R. 28),

Comparative analysis of

(1) Rates on fruits and vegetables from California to eastern territories,

(2) Rates upon other perishable traffic in effect throughout the United States,

(3) General level of the deciduous fruit rates as compared with the level of other transcontinental rates (R. 29–31),

Comparative earnings (R. 32),

Comparison of relative rate levels, i. e., the relation of the deciduous fruit rates to the body of transcontinental rates eastbound and westbound (R. 36–38),

Average load of deciduous fruits (R. 39),

Movement of the fruits in trainload lots (R. 39),

Weather conditions during movement (R. 39),

Service performed by the carriers (R. 43),

Operating difficulties (R. 43),

Time schedules maintained by fruit trains (R. 44),

Empty return movement (R. 45),

Loss and damage claim payments (R. 46),

Service at terminals (R. 46),

Diversions and reconsignments (R. 47),

Cost of wages, supplies and repairs (R. 47–48),

Carriers' operating returns (R. 49–50),

Financial condition of the carriers (R. 51–53),

Cost of the service (R. 53–55).

We shall refer briefly to portions of the evidence to demonstrate that the charge that the Commission fixed the rates assailed without substantial evidence to support its order is baseless.

EVIDENCE BEARING ON THE REASONABLENESS OF THE RATES

1. *Rates on California deciduous fruits remained practically at their war-time peak while the rates on the great body of transcontinental traffic were reduced.*—The rates on deciduous fruits, like all other rates in the United States, were subjected to drastic increases as a result of war-time conditions, the history of which has been traced above.

The pre-war rate on deciduous fruit from California to the East was $1.15. (Ex. 28, R. 229–230.) This rate, established voluntarily by the carriers in 1911, remained in effect until June 25, 1918, when, as a result of the 25% increase, it became $1.44. On August 26, 1920, it was subjected to the horizontal increase of 33⅓% and became $1.92[1]—its "war-time peak." (R. 409–410.)

On July 1, 1922, pursuant to the nation-wide reduction of 10%, the California deciduous fruit rate was reduced from $1.92 to $1.73. This reduced rate was first established temporarily by the voluntary action of the carriers on January 1, 1922,

[1] This was the rate to all groups other than "J," which is here neglected because of the small volume of traffic to that group.

and after July 1, 1922, was continued without time limit. (R. 409–410.)

No further reduction was granted by the carriers in this rate and it was still in force at the time the complaint was filed with the Commission on December 27, 1926. So that it was then but 10% less than the war-time peak and was 50.4% higher than the pre-war rate of $1.15. (R. 237; Ex. 32, R. 238.)

Meanwhile the rates on the great body of transcontinental traffic had been reduced from the war-time peak. Beginning about January 1, 1922, there had taken place a gradual downward readjustment of the transcontinental rate structure. The rates on deciduous fruit did not share in this downward readjustment and as a result deciduous fruit rates were upon a higher level above the pre-war basis at the time the complaint was filed than were the rates upon the great body of transcontinental traffic. Proof of this was submitted by showing that upon 75 commodities moving eastbound and upon 65 commodities moving westbound, admitted by the carriers to represent a fair cross-section of the transcontinental traffic (R. 464, 467), the rates averaged 29% and 22% above the pre-war level. Import and export rates from and to Pacific coast ports exceeded the pre-war basis on an average of 41% and 18%, respectively. The rates on lumber from the Pacific coast moving transcontinentally exceeded the pre-war basis but 23%, and those on petroleum and its products but

25%. Fresh citrus fruits were only 35% higher. In *Express Rates 1922,* 83 I. C. C. 606, and 89 I. C. C. 297, the Commission found the carload express rates then in effect on fruits, berries, vegetables, butter, and eggs to be unreasonable and ordered them reduced. As a result of that order, the carload express rate on fruits and vegetables from the Pacific coast to New York and other points east of Chicago was only 27.6% above the pre-war level. If the deciduous fruit rates here involved had been reduced to reflect the same percentage over the pre-war basis, the $1.73 rate would have become $1.465. The Commission prescribed $1.60. (R. 238–241; Exs. 32 to 39; R. 462–468.) To recapitulate, these rate levels are set out in tabular form:

Percentage above pre-war basis[1]

Deciduous fruits	50.4
Fair cross section of transcontinental traffic:	
Eastbound (75 commodities)	29
Westbound (65 commodities)	22
Import rates from Pacific coast ports	41
Export rates to Pacific coast ports	18
Lumber	23
Petroleum and its products	25
Fresh citrus fruits	35
Express rates on fruits and vegetables	27.6

Thus, while all rates went up together and all reached their war-time peak, practically all have since come down materially except the deciduous

[1] Meaning the basis in effect immediately prior to the general 25% increase of June 25, 1918.

fruit rates, with the result that a disproportionate share of the transcontinental freight-rate burden was cast upon deciduous fruits. Complainants sought the same benefits for deciduous fruits that the carriers, in the exercise of their rate-making discretion, had granted to other transcontinental traffic quite generally.

These rates are not less a valid basis of comparison because voluntarily established by the carriers (*Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 553; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 565), nor is the suggestion (appellants' brief, pp. 115–116; dissenting opinion of Commissioner McManamy, R. 62; see generally, as to water competition, R. 462–468) that some of these through rates may have been reduced to meet water competition through the Panama Canal, or otherwise, of weight. Certainly, it should not be contended that the complainants should be discriminated against in comparison with other transcontinental railroad rates because the commodities which they shipped were perishable and therefore could not be transported by water. (*Cf. Virginian Ry.* v. *United States*, 272 U. S. 658, 665.)

2. *The rates on deciduous fruits were higher than the rates generally prevailing on other fruits and vegetables moving transcontinentally from California.*—A comparison of the deciduous fruit rates in issue with the rates on the other principal

fruits and vegetables that move from California to the East showed that generally speaking the rates on the deciduous fruits were the highest. For instance, the $1.73 rate on deciduous fruits to the eastern groups was 18 cents per 100 pounds higher than the rate on oranges to the same destination groups and 23 cents per 100 pounds higher than the rates on lemons and apples to the same groups. (R. 230–231; Ex. 29.)

The deciduous fruit rates in issue were also generally higher on the average than the transcontinental rates on melons, cantaloupes, and vegetables. The differences are shown in the following tabulation (Ex. 29):

	From California points to groups					
	A	B	C	D–E	F–G–H	J
Melons, Cantaloupes, Vegetables (in packages)	175	173	165	146	139	134
Deciduous fruits	173	173	173	173	173	162

There was an even greater disparity as between the rates on deciduous fruits and those on vegetables in bags and fresh cabbage in crates. The deciduous fruit rates exceeded these latter rates in the following amounts (Ex. 29):

	Cents
To Group A	22
To Group B	37.5
To Group C	45
To Groups D and E	63
To Groups F, G, and H	63
To Group J	56

There were also comparisons as between deciduous fruits and other fruits and vegetables in respect of the revenue on the per car, per car-mile, per net ton-mile, and per gross ton-mile bases, calculated upon the average weighted haul. (Ex. 30, R. 232; R. 230–231; R. 411–413; Ex. 166, R. 412.) These comparisons are set out in tabular form in the Commission's report (R. 31) and need not be reproduced here. As stated in the report, the earnings per car on deciduous fruits were higher than on lemons and were materially higher than on fresh vegetables and cantaloupes. They were lower than on apples and citrus fruits, but considering the length of the haul, the net ton-mile earnings on deciduous fruits were relatively higher than on all the other commodities, while the car-mile and gross ton-mile earnings were higher in some instances and lower in others. (R. 32.)

3. *The rates on deciduous fruits from California yielded greater revenue than the rates on other comparative traffic for similar hauls in other sections of the United States.*—Comparisons of the deciduous fruit rates in issue with the rate on bananas and cocoanuts from New Orleans and other Gulf ports to Portland, Oreg., Spokane and Seattle, Wash., Vancouver, B. C., and Los Angeles and San Francisco, Calif., an average distance of 2,964.8 miles (R. 250), which is about the same as the weighted average haul of California's deciduous fruits in 1926 (2,970 miles (Ex. 166, R.

412)), showed that while the rate on the latter commodities was somewhat higher, the per car revenue was substantially lower, being $360.02 per car (Ex. 64, R. 250) as against $489.42 per car on deciduous fruits (Ex. 166, R. 412).

A summary of 171 rates on bananas from New Orleans and other Gulf ports to destinations in eastern trunk-line, central freight association, western trunk-line, and transcontinental territories, applying for an average distance of 2,525 miles, showed that the average earnings per car and per gross ton-mile were lower than the average under the deciduous fruit rates assailed. (Ex. 65, R. 251.)

Similar comparisons showed that the rates on pineapples from Gulf ports to Pacific coast points, an average distance of 2,938 miles, yielded average earnings, after deducting terminal expenses absorbed by the carriers, of $461.40 per car (Ex. 66, R. 251–252), as against $489.42 (Ex. 166, R. 412) yielded by the deciduous fruit rates in issue.

4. *The deciduous fruit traffic moves in tremendous volume.*—As stated in the Commission's report, "volume of movement is an important factor in testing the reasonableness of a rate." (R. 38.) In 1926, the movement to groups A to M, except J, amounted to 1,044,969 tons. This vast tonnage moved in 74,456 cars made up as follows: Grapes, 58,334; pears, 9,523; plums, 4,741; peaches, 1,093; and miscellaneous, 765. The movement to group J amounted in 1926 to 8,768 tons, or 627 cars. (Ex. 166, R. 412.)

In 1916 the total carload shipments of deciduous fruits from California to interstate destinations amounted to 17,891 cars. In 1925 the shipments approximated nearly five times that number, 86,795 cars. (R. 223.) In 1926 the movement was 78,803 cars. (R. 223.) The movement of deciduous fruits begins in June and continues in substantial quantities until December. From June 15 to November 20, 1926, there were only nine days upon which less than 100 cars of deciduous fruit originated on the Southern Pacific and the Western Pacific for eastbound movement. (R. 38.) While in many instances reconsignments necessitate taking some of the cars out of the train en route, nevertheless many of the trains go through solid. (R. 39.) This is a factor which has a decided bearing upon the reasonableness of the rates, for, as stated by the Commission in *Cattle Raisers' Asso.* v. *Missouri, K. C. T. R. Co.*, 11 I. C. C. 296, 335:

> No one thing so contributes to reducing the cost of movement as the ability to handle traffic long distances in solid trains.

5. *Fruit prices have been deflated while freight rates on fruit have remained inflated.*—While deciduous fruit prices were generally inflated during and following the period of the World War, freight rates likewise reached their peak at about the same time. Freight rates on deciduous fruits did not change in the face of changed conditions in the deciduous fruit industry. The challenged rates on deciduous fruits were but 10% less than the war-

time peak (Ex. 28, R. 230), while the price levels of all deciduous fruits had been deflated to a point where the weighted average prices in 1926 were less than 57% of the peak prices received in 1920. For example, the average price in 1917 of apricots, grapes, peaches, pears, and plums was $5.43 per 100 pounds; in 1920, it was $9.97 per 100 pounds; 1926, $5.62 per 100 pounds. *Compared with 1917 prices, those in 1926 were but 3.5% higher, while the freight rates were still 50.4% above the 1917 level.* (Exs. 24 and 25, R. 226, 228.)

In 1920, transportation and refrigeration charges constituted 18.8 per cent of the price received for the fruits in eastern markets; in 1925 this percentage had grown to 35. (Exs. 26 and 27, R. 228.)

Summary.—A very full and complete record was developed which disclosed with unusual thoroughness the facts and circumstances which a rate-making body would need to consider in fixing rates upon the traffic, including virtually all conceivable elements of rate making. It is believed that the evidence establishing the five facts referred to above alone is sufficient to support the Commission's order. That the evidence did tend to establish these facts is not denied.

Indeed, the evidence before the Commission in this case would, it is believed, have fully sustained a reduction of rates under Section 1 of the Interstate Commerce Act, even apart from the Hoch-Smith Resolution.

There was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. (*Interstate Commerce Commission* v. *Union Pacific R. R., supra,* page 550.)

THE INCREASE IN THE CARLOAD MINIMUM WEIGHT ON GRAPES HAS AN IMPORTANT BEARING UPON THE MATTER OF THE REASONABLENESS OF THE RATES AND THE CARRIERS' REVENUES THEREUNDER.

It is a practice as old as railroading to make a difference in the charges depending upon the quantity offered for shipment. At an early date the Commission approved carload rates lower than less-than-carload rates on the same goods between the same points. *Thurber* v. *N. Y. C. & H. R. R. Co.,* 3 I. C. C. 473. The minimum quantity to which the carload rate will be applied (the carload minimum weight)[1] fixes the carriers' minimum earnings under the carload rate, and, as the Commission has often pointed out, the minimum weight applying in connection with a carload rate is not merely something affecting the rate, but is in fact a part of the rate, a factor which is just as essential to a correct statement of the rate as is the rate per 100 pounds itself. *Rail & River Coal Co.* v. *B. & O. R. R.,* 14 I. C. C. 86, 90; *Sunderland Bros.* v. *St. L. & S. F. R. R. Co.,* 23 I. C. C. 259, 261.

The rates which the Commission found to be unreasonable in the case at bar were $1.62 to Group J,

[1] Cf. *Ex Parte Young* 209 U. S. 123, 128.

and $1.73 to the other groups. These were carload rates (no less-than-carload rates were involved), and applied to all deciduous fruits. The carload minimum weight applying in connection with both of those rates was 26,000 pounds. The reduced rates prescribed by the Commission are $1.50 to Group J and $1.60 to the other groups. In connection with both of these rates the minimum of 26,000 pounds continues to apply to all the deciduous fruits except *grapes,* as to which the minimum is 30,000 pounds.

Neglecting Group J, let us compare the old rate of $1.73, minimum 26,000 pounds, with the prescribed rate of $1.60, minimum 30,000 pounds, to the other groups, on shipments of grapes, which constitute at least 75 per cent of the traffic. (R. 23.) The *minimum carload revenue* under the old rate ($1.73 per 100 pounds x 26,000 pounds) was $449.80. Under the prescribed rate the minimum carload revenue is $480 ($1.60 per 100 pounds x 30,000 pounds). Thus, the smallest amount which the carriers can collect under the prescribed rate on grapes is $480, whereas under the old rate the amount might have been as low as $449.80, or $30.20 less than under the new basis prescribed by the Commission.

During the year 1926 when the minimum of 26,000 was in effect the average weight of all grapes shipped was 28,840 pounds, and the average revenue on grapes was $498.69. Since 28,840 pounds was the *average,* and since the minimum then applicable

was 26,000 pounds, it is reasonable to suppose that some carloads were shipped which weighed only 26,000 pounds, and such the carriers must have transported for a revenue as low as $449.80. But under the reduced rate of $1.60, minimum 30,000 pounds, the carriers will never be called upon to transport a carload shipment of grapes for less than $480.

Economies in operation will be effected as a result of the higher minimum on grapes. A substantial saving in equipment will necessarily result. It will reduce track and terminal congestion, it will enable the same group of employees to handle a greater tonnage, it will result in fewer refrigerator cars being built, it will effect a reduction in the maintenance charge of cars and decrease the number of cars returned empty.

These considerations are fully recognized in decisions of the Commission. *Transportation of Wool, Hides, and Pelts,* 23 I. C. C. 151, 167; *1915 Western Advance Rate Case,* 35 I. C. C. 497, 575; *Minimum Weights on Iron and Steel Articles,* 101 I. C. C. 3, 6; *Lumber Carload Minima,* 68 I. C. C. 98, 106; *Minimum Carload Weight on Hogs,* 81 I. C. C. 373, 379.

In the well known *Lemon Case* (*Arlington Heights Fruit Exchange* v. *Southern Pac. Co.*), 22 I. C. C. 149, in which the Commission reduced the transcontinental rate on lemons from $1.15 to $1.00, its order being upheld by the Commerce Court and

this Court, 203 Fed. 56, and 231 U. S. 736, the Commission said (p. 154):

> There can be little doubt that from a purely transportation standpoint, having reference mainly to the cost of the service, a $1 rate with a minimum of 34,000 pounds is better business than a minimum of 26,200 pounds at a rate of $1.15.

THE COMMISSION GAVE CONSIDERATION TO THE REQUIREMENTS OF THE RESOLUTION THAT THE RATES SHOULD BE COMPATIBLE WITH THE MAINTENANCE OF ADEQUATE TRANSPORTATION SERVICE

The Commission's statement in its report (R. 56), "It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service," was reached after consideration of all relevant facts, and especially evidence showing the operating returns of the carriers and their general financial condition.

The evidence showed, as pointed out in the report (R. 49), that "the operating returns of most of the principal carriers engaged in handling this traffic have increased in a marked degree during the last few years." A table, compiled from exhibits of record (Ex. 40, R. 242), and reproduced in the report (R. 50), compared the 1926 net railway operating income of ten of the principal systems that handle deciduous fruits with the average net incomes of the same carriers during the 12-year period 1914 to 1925, and showed the percentage increase, 1926 over 1914. For instance, in the case of the South-

ern Pacific, which carries a greater tonnage of the deciduous fruit traffic than any other carrier (R. 19), its average annual income for the 12-year period was $36,574,064, while its income in 1926 was $48,128,841, an increase in 1926 of 31.59 per cent over the 12-year average, and 46.50 per cent over the year 1914. The table referred to is here reproduced:

	Income average 12-year period	Income, 1926	Percentage increase, 1926 over average	Percentage increase, 1926 over 1914
Southern Pacific	$36,574,064	$48,128,841	31.59	46.50
Santa Fe	38,185,732	55,498,700	45.44	89.66
Western Pacific	2,305,033	4,337,205	81.09	1,191.33
Union Pacific	27,509,076	27,853,065	1.25	46.49
North Western	15,934,401	22,295,139	39.92	17.26
Milwaukee	14,497,122	18,394,023	26.90	[1] 30.28
Pennsylvania	48,044,313	106,432,758	121.53	128.39
New York Central	49,144,839	72,181,053	46.77	207.22
Erie	7,813,098	18,062,723	131.09	43.08
Baltimore & Ohio	22,014,068	50,805,337	130.79	183.71

[1] Decrease.

Comparison of the net operating incomes of these ten roads for 1926 with a year when rate levels were at their peak—1921—showed that in each instance the 1926 income was substantially higher than in 1921, with the single exception of the Union Pacific. (R. 51.)

A consolidated statement showed that railway operating revenues of the four principal carriers that serve California—the Southern Pacific (Pacific System), the Santa Fe, the Western Pacific, and the Los Angeles & Salt Lake—had advanced from $421,498,800 in 1921 to $473,422,000 in 1926, an in-

crease of $51,923,200. But railway operating expenses remained about the same, being $321,341,884 in 1921 and $322,595,028 in 1926, an increase of but $1,253,144. Net railway operating income was $70,298,291 in 1921 as compared with $110,520,485 in 1926, an increase of $40,222,194. (R. 51; Ex. 53, R. 243.)

The defendant carriers showed that the rates of return on the property investments of some of the principal carriers for the years ending December 31, 1925 and 1926, were as follows (R. 52):

	1925	1926
	Per cent	Per cent
Southern Pacific lines	3.70	[1] 3.92
Santa Fe system	5.53	6.86
Western Pacific	3.66	3.64
Union Pacific system	4.76	4.87
North Western	4.10	4.25
Milwaukee	2.26	2.46
Illinois Central system	4.86	4.30
Erie system	3.37	3.43
Pennsylvania system	4.80	4.65
Baltimore & Ohio	5.33	6.03
New York Central lines	5.17	5.29

[1] Pacific lines, 4.04 per cent.

Commenting upon this showing the Commission said (R. 53):

> The Santa Fe and the Baltimore & Ohio are the only carriers shown as having earned in excess of 5.75 per cent in 1926. For 18 principal carriers in the western district, including the Illinois Central system, the average return in 1926 was 4.43 per cent and for five principal carriers in the eastern district 4.9 per cent.

The Commission added, significantly,

> All the foregoing rates of return are computed with relation to the property investment accounts.

In other words, they are not based upon the values of their properties as determined by the Commission in pursuance of Section 19a of the Act, but according to the book values. In weighing the evidence in the light of its own knowledge and experience, the Commission could, of course, give consideration to the fact that the book values might be very different from the actual values. Compare *Increased Rates 1920,* 58 I. C. C. 220, 227–230, under the heading "Property Investment;" *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299, 304.

In the light of the above evidence, considered in connection with various other facts and circumstances disclosed by the record, the Commission could conclude, as it did, that the slight rate reduction which it here ordered, coupled with the simultaneous increase in the carload minimum weight on grapes from 26,000 to 30,000 pounds, "would not affect the maintenance of adequate transportation service" (R. 56), and that the reduced rates prescribed would be "compatible with the maintenance of adequate transportation service" (R. 59).

THERE WAS NO SUBSTANTIAL EVIDENCE THAT RATES PRESCRIBED WOULD BE CONFISCATORY

The appellants' contention that the record before the Commission shows that the rates assailed are

confiscatory is based largely on the charge that the Commission did not give proper weight to the "cost study" offered in evidence by the carriers.

The "cost study" referred to is an exhibit (No. 252, R. 482) which purported to show the average operating expense involved in transporting a car of grapes over the Santa Fe from Bakersfield to Chicago, a distance of 2,331 miles, including the cost of assembling such cars at Bakersfield and the return-empty movement. The exhibit consisted of but a single sheet, and purported to show, for each division of the Santa Fe, the average cost per car per mile, and then, by multiplying that cost by the number of miles on each division, the total expense on each division for one car. Then the total expenses on the several divisions are added up, and the total so arrived at, plus terminal expenses at Kansas City and Chicago, plus an amount representing loss and damage, minus an item relating to refrigeration (which is covered by the separate refrigeration charge), is given as the total expense per car.

That expense is shown as $350.23. "From this amount counsel for defendants indicated that it would be proper to deduct $5 per car for cost of repairs to refrigeration devices, and $4 per car for supervision, leaving the net operating expense $341.23 per car, equivalent to 14.64 cents per car-mile." (Commission's Report, R. 53.)

No supporting data of any kind was given. No details were given which would permit a check. Witness Conrad in his oral testimony very briefly stated the general methods he used, but he did not give the component figures.

Such an unsupported assertion as to the cost of the service can not be accepted as the clear and definite proof that the law requires.

Further, the great bulk of the expenses assigned consisted of estimates.

The only costs which were assigned to these trains on an actual basis were the wages of the train and enginemen, quantities of fuel used, and switching costs. (R. 476.) The witness said (R. 476):

> The others are *unallocatable* expenses, and they were assigned to these trains on a unit-cost basis. In such assignments there were only the main-line costs considered.

From an exhibit (R. 489) submitted, under stipulation of the parties (R. 488), after the close of the hearing, it was ascertained that the total direct cost for train and enginemen's wages, and fuel, inclusive of the return-empty-car haul, was $3,076.26 per train ($1,162.40 for the wages and $1,913.86 for the fuel, Ex. R. 489), or $55.92 per car, assuming a train of 55 cars.

All of the alleged cost of $341.23, other than this $55.92 for wages and fuel, was made up of "unallocatable expenses" which were estimates. There is no basis for a determination whether these estimates were correct.

Necessarily, many of the estimates made do not represent actual costs but only estimates of the *average costs* on all traffic. This is admittedly so as to the costs on the Valley Division, which included even dead freight, and all local freight, carload and less than carload. (R. 484.) Those costs are shown by Exhibit 252 to be 35.85 cents per car-mile, the highest cost on any division and more than double that on the next highest, and about three times that on most of the other divisions. The estimate as to the Valley Division must therefore be rejected under the authority of *Northern Pacific Ry.* v. *Department of Public Works,* 268 U. S. 39, 43–44.

Even if this cost study proved with the definiteness and certainty which the law requires in confiscation cases what it purports to show, viz, the cost to the Santa Fe of transporting over its line a car of grapes from an originating point in California to Chicago in September, 1923, still it would have to be rejected as falling far short of proving confiscation in this case, for the following reasons:

(1) Although the Commission's order is directed to several hundred railroads, the exhibit admittedly attempts to show the costs on only one railroad, namely, the Santa Fe. No effort whatever was made to show the costs of transporting deciduous fruit on the numerous other roads which carry this traffic. The *only* evidence as to the other roads consists of an assertion by witness Conrad that he did not think the traffic could be handled as cheaply by

combination lines as it was handled by the Santa Fe. (R. 481–482.) Compare *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 482; *Minnesota Rate Cases,* 230 U. S. 352, 469, 473.

(2) The exhibit purports to cover only one of the deciduous fruits here involved, viz, grapes.

(3) Although it is not asserted that the prescribed rate of $1.60 as applied to shipments to *Chicago,* 2,331 miles, is confiscatory, but only as applied to the *average weighted haul* of 2,970 miles, which would be a point 639 miles east of Chicago, the cost of the service east of Chicago is not shown, and it is inferred that the average cost per mile east of Chicago on any railroad which handles the traffic is precisely the same as the average cost per mile on the Santa Fe west of Chicago. (Compare *St. Louis & San Francisco Ry.* v. *Gill,* 156 U. S. 649.)

(4) No attempt was made to show the average costs over a considerable period of time, but admittedly the cost figures presented were arrived at by investigation of the costs during one month only. The month selected was September in the year 1923. The exhibit was submitted at the hearing held in March, 1927. Speculations, opinions and inferences only were offered in support of the proposition that the costs were no lower in 1927 than in 1923.

The language of Mr. Justice Moody in *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 17–18, is apposite.

Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon *speculation* as to its effect, based upon the operations of a prior fiscal year, we will not *guess* whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. *It is enough that the whole case leaves us in grave doubt.*

CONCLUSION

The decree of the court below dismissing the bills for want of equity should be affirmed.

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APPENDIX

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